

1980

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### Recommended Citation

Kathleen E. Slusser, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes*, 8 Fordham Urb. L.J. 913 (1980).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol8/iss4/7>

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# THE EFFECT OF THE NEW SEC RULES ON THE CONSTITUTIONALITY OF STATE TAKEOVER STATUTES

## Introduction

On December 6, 1979, the Securities and Exchange Commission (SEC) announced the adoption of new rules<sup>1</sup> governing tender offers.<sup>2</sup> The rules address the current problems and abuses<sup>3</sup> in the tender offer field by clarifying existing provisions of<sup>4</sup> and adding new requirements to<sup>5</sup> the Williams Act.<sup>6</sup>

In addition to the SEC rules and regulations, tender offers are regulated by state law. To date, thirty-seven states have enacted tender offer legislation.<sup>7</sup> The constitutionality of these state stat-

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1. 44 Fed. Reg. 70,326 (1979) (to be codified in 17 C.F.R. §§ 230, 240). The SEC is authorized to promulgate these rules under § 23(a) of the Securities Exchange Act of 1934.

2. A tender offer is defined as a public offer by an individual, company, or group to purchase a block of securities of a publicly held corporation for cash or securities or both. E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 70 (1973) [hereinafter cited as ARANOW & EINHORN]; E. Aranow, H. Einhorn & G. Berstein, *Developments in Tender Offers for Corporate Control* 1-34 (1977).

3. 44 Fed. Reg. 70,329 (1979). The SEC release accompanying the new rules reads: Rule 14d-2(b) is intended to prevent public announcements by a bidder of the material terms of its tender offer in advance of the offer's formal commencement. The Commission believes that this practice is detrimental to the interests of investors and results in many of the abuses the Williams Act was enacted to prevent.

*Id.*

4. For example, the Williams Act does not define whether a press release, newspaper advertisement, or public statement constitutes the commencement of a tender offer. Under the new rules, these types of public announcements which identify the offeror, target company, offering price, and number of shares constitute the commencement of a tender offer. See 15 U.S.C. § 78n(d) (1976).

5. For example, the new rules define the minimum offering period for a tender offer as twenty business days, whereas, prior law contained no minimum offering period. See 44 Fed. Reg. 70,348 (1979) (to be codified in 17 C.F.R. § 240.14e-1(a)).

6. 15 U.S.C. § 78i(i), 78m(d)-(e), 78n(d)-(f) (1976).

7. ALASKA STAT. §§ 45.57.010 to -120 (Supp. 1979); ARK. STAT. ANN. §§ 67-1264 to -1264.14 (Supp. 1979); COLO. REV. STAT. §§ 11-51.5-101 to -108 (Supp. 1978); CONN. GEN. STAT. §§ 36-456 to -468 (1979); DEL. CODE ANN. tit. 8, § 203 (Cum. Supp. 1978); FLA. STAT. ANN. §§ 517.35 to .363 (Supp. 1978); GA. CODE ANN. §§ 22-1901 to -1915 (1977); HAWAII REV. STAT. §§ 417E-1 to -15 (1976); IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979) (repealed 1979); ILL. ANN. STAT. ch. 121 ½, §§ 137.51 to 137.7 (Smith-Hurd Supp. 1979); IND. CODE ANN. §§ 23-2-3.1-1 to -11 (Burns Supp. 1979); IOWA UNIFORM SECURITIES ACT §§ 502.102, .211-.215 (Supp. 1979), reprinted in [1979] 1A BLUE SKY L. REP. (CCH) ¶ 18.142, .161 to .165; KAN. STAT. ANN. §§ 17-1276 to -1285 (1974); KY. REV. STAT. §§ 292-560-.991 (Supp. 1978); LA. REV. STAT. ANN. §§ 51:1500-.1512 (West Supp. 1980); ME. REV. STAT. ANN. tit. 13, §§ 801-817

utes has been a constant source of debate.<sup>8</sup> Several recent court challenges to state takeover statutes have been successful.<sup>9</sup> Most notably, in *Great Western United Corp. v. Kidwell*,<sup>10</sup> the Court of

(Supp. 1979); MD. CORP. & ASS'NS CODE ANN. §§ 11-901 to -908 (Supp. 1979); MASS. ANN. LAWS ch. 110C, §§ 1-13 (Michie/Law Co-op Supp. 1979); MICH. COMP. LAWS ANN. §§ 451.901-.917 (Supp. 1979); MINN. STAT. ANN. §§ 80B.01-.13 (West Supp. 1979); MISS. CODE ANN. §§ 75-72-1 to -23 (Supp. 1979); *Mo. Take-Over Bid Disclosure Act*, 1978 Mo. LAWS S.B. No. 820, reprinted in [1979] 2 BLUE SKY L. REP. (CCH) ¶¶ 28,201-28,214; NEB. REV. STAT. §§ 21-2401 to -2417(1977); NEV. REV. STAT. §§ 78.376 to .3778 (1973); N.H. REV. STAT. ANN. §§ 421-A:1 to :15 (1977); N.J. STAT. ANN. §§ 49:5-1 to :19 (West Supp. 1979); N.Y. BUS. CORP. LAW §§ 1600-1613 (McKinney Supp. 1979); N.C. GEN. STAT. §§ 78B-1 to -11 (Cum. Supp. 1979); OHIO REV. CODE ANN. § 1707.041 (1978); 70 PA. CONS. STAT. ANN. §§ 71-85 (Purdon Supp. 1979); S.C. CODE §§ 35-2-10 to -110 (Cum. Supp. 1979); S.D. COMP. LAWS ANN. ¶¶ 47-32-1 to -47 (Supp. 1979); TENN. CODE ANN. §§ 48-2101 to -2114 (1979 & Supp. 1979); UTAH CODE ANN. §§ 61-4-1 to -13 (1978); VA. CODE §§ 13.1-528 to -541 (1979); WIS. STAT. ANN. §§ 552.01-.25 (West Special Pamphlet 1979); Tex. Administrative Guidelines for Minimum Standards in Tender Offers 065.15.00.100-.800, reprinted in [1979] 3 BLUE SKY L. REP. (CCH) ¶¶ 55,671- 55,682. The Delaware, Idaho and part of the Virginia statute have been declared unconstitutional. The Idaho statute has been repealed.

8. Compare Aranow & Einhorn, *State Securities Regulation of Tender Offers*, 46 N.Y.U.L. REV. 767 (1971) [hereinafter cited as *State Securities Regulation*]; Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency*, 62 CORNELL L. REV. 213 (1977) [hereinafter cited as *Langevoort*]; Moylan, *State Regulation of Tender Offers*, 58 MARQ. L. REV. 687 (1975) [hereinafter cited as *Moylan*]; Wilner & Landy, *The Tender Trap: State Takeover Statutes and their Constitutionality*, 45 FORDHAM L. REV. 1 (1976) [hereinafter cited as *Wilner & Landy*] and Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133 (1974) [hereinafter cited as *Commerce Clause Limitations*] (State statutes are preempted by the Williams Act) with *The Constitutionality of State Takeover Statutes: A Response to Great Western*, 53 N.Y.U.L. REV. 872 (1978) [hereinafter cited as *A Response to Great Western*] and Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 YALE L.J. 510 (1979) [hereinafter cited as *Statutes Reconsidered*] (State statutes should not be preempted by the Williams Act). Wilner & Landy argue that the state statutes are preempted principally because the advance notice and hearing requirements of the state statutes frustrate the purpose of the Williams Act. Additionally, the authors argue that there is pervasive federal regulation in the tender offer area and that certain takeover provisions, particularly withdrawal and proration provisions, directly conflict with the Williams Act. Wilner & Landy, *supra*, at 23-32. See also pt. III *infra*.

9. See, e.g., *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979) (Idaho Statute); *Televest Inc. v. Bradshaw*, [Current] FED. SEC. L. REP. (CCH) § 97,154 (E.D. Va. Sept. 3, 1979) (Virginia Statute); *Dart Industries Inc. v. Conrad*, 462 F. Supp. 1 (S.D. Ind. 1978) (Delaware Statute).

10. 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979). Prior to this decision, the federal courts had not addressed the merits of the constitutional claims. In *Flynn v. Bass Bros. Enterprises, Inc.*, 456 F. Supp. 484 (E.D. Pa. 1978), the court did not address the merits of the preemption claim raised by plaintiff. The court stated:

Any discussion of the merits of this argument would be premature, for it is not clear

Appeals for the Fifth Circuit held that the Idaho takeover statute was preempted by the Williams Act.<sup>11</sup> In contrast, other courts have upheld state tender offer regulations on the grounds that the Williams Act does not implement a pervasive regulatory scheme sufficient to establish federal preemption and that the purpose of state tender offer regulation does not conflict with the purpose of the Williams Act.<sup>12</sup>

This Note will evaluate the constitutionality of state takeover statutes in light of the new SEC rules. Part I will discuss the procedural and substantive requirements of both the Williams Act and the new SEC rules. Part II will describe state takeover statutes, the purposes such statutes serve, and their effect on tender offers. Part III will discuss the preemption question and will argue that state takeover statutes are unconstitutional by virtue of their conflict with specific provisions of the new SEC rules.

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at this point that Delaware law actually requires greater disclosure in the present factual context than does the Williams Act. Nor is it clear that any such discrepancy runs counter to the policies underlying federal regulation of tender offers.

*Id.* at 494.

11. The case invalidated IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979). The statute was also invalidated on commerce clause grounds. The test used in determining whether a state statute violates the commerce clause requires balancing the statute's burden on interstate commerce and the legitimate state interests served by the law. See *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978). A statute will generally be held to violate the commerce clause if it impedes the free flow of commerce between the states or affects an area of commerce requiring national uniformity. See *Southern Pac. v. Arizona ex rel Sullivan*, 325 U.S. 761, 767 (1945). A statute will be upheld if it effectuates a legitimate state interest and the burden on interstate commerce does not outweigh the state's putative local benefits. See *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970). In *Great W. United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds sub nom. Leroy v. Great W. United Corp.* 443 U.S. 173 (1979), the court held that the Idaho takeover statute was invalid under the commerce clause because the burdens of the statute were disproportionate to the legitimate local benefits. The court recognized Idaho's legitimate interest in protecting incumbent management as a corporation can influence local life style through charitable contributions and civic involvement. In addition, the court recognized the legitimate state interest in protecting investors, but stated that this interest was substantially diluted "since Idaho had little reason to protect out-of-state shareholders, which comprised the majority of those affected by the takeover act. The court held that, in relation to these legitimate local benefits, the burden on interstate commerce was disproportionate. The court noted that, in this case, the Idaho law halted over thirty-one million dollars of interstate commerce. Furthermore, the Idaho statute would compel a non-Idaho offeror to make burdensome disclosures beyond those required by federal law. *Id.* at 1281-86. This Note will not discuss the commerce clause issue. On the commerce clause issue in the preemption context, see generally *Commerce-Clause Limitations*, *supra* note 8, at 1152-62; Wilner & Landy, *supra* note 8, at 15-23.

12. See, e.g., *AMCA Int'l Corp. v. Krouse*, 48 U.S.L.W. 2441 (S.D. Ohio Dec. 21, 1979); *City Investing Co. v. Simcox*, 514 SEC. REG. & L. REP. (BNA) A-11 (S.D. Ind. July 27, 1979).

## I. Current Federal Tender Offer Regulations

### A. A History of the Tender Offer Device

Tender offers became a popular mechanism for acquiring control of corporations in the 1960's.<sup>13</sup> When compared with public exchange offers<sup>14</sup> or proxy contests,<sup>15</sup> tender offers were considered a superior method of acquiring corporate control.<sup>16</sup> The public exchange offer was disadvantageous because the transfer had to be registered with the SEC in advance;<sup>17</sup> the proxy contest method was costly because of the high price involved in soliciting proxies.<sup>18</sup> Several economic factors also contributed to the increase in tender offers in the 1960's, particularly the increased availability of credit,<sup>19</sup> the increased liquidity of acquiring corporations,<sup>20</sup> and the accept-

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13. See Aranow & Einhorn, *supra* note 2, at 64-69; *Commerce Clause Limitations*, *supra* note 8, at 1136.

14. A public exchange offer is a means of acquisition of control of a company through an exchange of stock. The offer is made to the shareholders and frequently stipulates that the offer of exchange will become operative only if holders of a majority of stock agree to turn in their shares. Stockholders desiring to exchange their shares will deposit their stock by a certain date with a named depository under a deposit agreement. FINANCIAL HANDBOOK 20-36 to -37 (4th ed. J. Bogen ed. 1964).

15. A proxy fight is a contest between management and insurgent groups for control of a corporation in which proxies are solicited from shareholders. A proxy is an instrument given by the shareholder to his agent giving him authority on all matters properly coming before a shareholder meeting. See generally H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS 382-86 (2d ed. 1970).

16. Hayes & Taussig, *Tactics of Cash Takeover Bids*, 45 HARV. BUS. REV. 136, 138 (1967); *Commerce Clause Limitations*, *supra* note 8, at 1138.

17. Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269, 273 (1969). A public exchange offer requires registration of the security under the Securities Act of 1933 and advance filing of a prospectus which subsequently must be given to tendering shareholders. 15 U.S.C. § 77f (1976). However, until 1968, cash tender offers were free of regulation and there was no mandatory disclosure by either the bidder or the target company.

18. See Cohen, *A Note on Take Over Bids and Corporate Purchases of Stock*, 22 BUS. LAW. 149 (1966); HAYES & TAUSSIG, *supra* note 16, at 137. Hayes & Taussig note that Robert Young's successful proxy fight for control of New York Central Railroad in 1954 cost more than \$1.5 million. Furthermore, their study shows that from 1956 to 1960, only nine out of 28 fights for control of corporations were successful.

19. Hayes & Taussig, *supra* note 16, at 138. The authors state that adequate financing has been available to acquisition-minded corporations in the 1960's. The authors state that the largest number of cash tender offers occurred during the fourth quarter of 1965, despite high interest rates. They state that the lag in the response of cash tender offers to tight money pressures may be explained by standby commitments for bank credit made by bidders some months in advance. *Id.*

20. *Id.* See *Commerce Clause Limitations*, *supra* note 8, at 1138 n.50. Hayes & Taussig note that from 1960 to 1965 corporate cash generation after taxes and dividends increased

ance by the business community of the tender offer as a proper business practice.<sup>21</sup>

Concomittant with the tender offer's increasing popularity was an increase in its abuse. Typically, a tender offeror would bid for control in order to liquidate the target corporation's stock and use the proceeds for the offeror's benefit.<sup>22</sup> Thus, such tender offerors were often characterized as "corporate raiders."<sup>23</sup> To rectify this problem, the Williams Act was enacted in 1968 as an amendment to the Securities Exchange Act of 1934 (Exchange Act).<sup>24</sup> The legislation was designed to protect investors by requiring more extensive disclosure of material information by the tender offeror to the target company shareholders.<sup>25</sup> The bill was also designed to provide "the offeror and management equal opportunity to fairly pre-

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\$3.4 billion. Because of the advantages of a cash buyout due to the absence of dilution of earnings or control and the opportunity to buy control for a much smaller investment than a cash acquisition of assets or merger, the tender offer became a popular mode of acquiring control.

21. See *Commerce Clause Limitations*, *supra* note 8, at 1139 n.58. See also Hayes & Taussig, *supra* note 16, at 138. The authors state that corporate managers and financial executives view it as legitimate. The authors note that industrial companies which are held in high regard in the business community, such as W.R. Grace, and Consolidated Foods, are using this method of acquiring control and that at least seven firms listed in Fortune's "500" were involved in takeover bids in 1966. *Id.*

22. *Id.* at 1137. See *Zahn v. Transamerica Corp.*, 162 F.2d 36 (3d Cir. 1947) (offeror purchased a controlling interest in target because target's principal asset, leaf tobacco, had greatly appreciated in value. The shareholders were unaware of this fact. Offeror planned to redeem the stock and then liquidate the company, thus appropriating the value of the tobacco to itself); *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544 (E.D.N.Y. 1971) (offeror did not disclose to tendering shareholders plans to either reorganize or liquidate target company and utilize surplus cash for its own benefit).

23. In his opening remarks in introducing the Williams Act, Senator Williams stated: "In recent years we have seen proud old companies reduced to corporate shells after white collar pirates have seized control with funds from sources which are unknown in many cases, then sold or traded away the best assets, later to split up most of the loot among themselves." 111 CONG. REC. 28257 (1965).

24. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811; S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967). In 1965, Senator Williams had proposed amendments to federal tender offer legislation. This bill required twenty days advance notice to the target company and thus protected incumbent management. This bill was never released from committee. S. 2731, 89th Cong., 1st Sess. 3, 111 CONG. REC. 28257 (1965). The Williams Act did not contain this provision for advance notice. The new SEC rules have the same purpose as the Williams Act. See notes 71-83 *infra* and accompanying text.

25. H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968), reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811; S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967).

sent their case"<sup>26</sup> and to equalize each party's advantage over the other.

## B. The Williams Act

Section two of the Williams Act, adding section 13(d) to the Exchange Act,<sup>27</sup> requires a person or corporation which becomes the owner of five percent or more of any class of equity securities of a registered company<sup>28</sup> to file a schedule 13D with the SEC containing certain information and to send the same information to the target company.<sup>29</sup> Filing of this information must occur within ten days after acquiring beneficial ownership of the above referenced five percent.<sup>30</sup> The Williams Act also requires the offeror to disclose the amount and source of the funds for purchase, the offeror's background and identity, and the extent of the offeror's holdings in the target company.<sup>31</sup> Where the offeror's purpose is to acquire control of the target corporation, the offeror must disclose whether it plans to liquidate the target, sell its assets, merge it with another company, or initiate any major change in the target's business.<sup>32</sup>

In addition to this 13(d) filing, section 14(d) of the Exchange Act provides that an offeror which acquires more than five percent of any class of equity security by means of a tender offer must first file a statement with the SEC.<sup>33</sup> This 14(d)-1 statement includes the same information required by section 13(d) and, in addition, requires disclosure of the source of funds used to purchase the target shares, past transactions with the target company,<sup>34</sup> and other

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26. See note 25 *supra*.

27. Section 13(d) of the 1934 Exchange Act applies to other transactions, for example, open market purchases, as well as tender offers. 15 U.S.C. § 78n(d)(1) (1976).

28. Equity securities are limited to those that: (1) are registered pursuant to § 12 of the Exchange Act, 15 U.S.C. § 78(l) (1976); (2) would have been required to be so registered but for the insurance company equity security exemption of § 12(g)(2)(G) of the Exchange Act, *id.* § 78l(g)(2)(G); or (3) are issued by a registered closed-end investment company under the Investment Company Act of 1940, *id.* §§ 80a-1 to -52. *Id.* § 78n(d)(1).

29. 15 U.S.C. § 78m(d) (1976 and Supp. 1 1977).

30. *Id.* This information is filed on a Schedule 13D.

31. *Id.* Certain transactions are exempt from the requirements of this subsection: 1) any acquisition to acquire securities made by means of a registration statement under the Securities Act of 1933, 2) any acquisition of beneficial ownership of a security which together with all other acquisitions by the same person of the securities of the same class during the preceding twelve months, doesn't exceed 2% of that class, and 3) any acquisition of an equity security by the issuer of such security. *Id.*

32. *Id.*

33. *Id.* § 78n(d).

34. *Id.*

material financial information about the offeror.<sup>35</sup> The offeror must also disclose any antitrust or other legal conflicts relating to the tender offer if such information would be material to the shareholders in deciding whether to tender their shares.<sup>36</sup> The offeror must publish or send a statement of the relevant facts contained in schedule 14D-1 to the shareholders of the target company.<sup>37</sup>

In addition to the filing and disclosure requirements, the Williams Act contains several provisions designed to protect target company shareholders. First, a tendering shareholder may withdraw his shares up to seven days after he has received the offer or after sixty days from the date of the original tender offer if the offeror has not already purchased the tendered shares.<sup>38</sup> The commencement of the tender offer is measured from the filing of a schedule 14D-1 with the SEC.<sup>39</sup> Second, if the offeror makes an offer for less than all of the outstanding securities and more securities are tendered within ten days after the offer has commenced, the offeror must purchase the additional shares pro rata.<sup>40</sup> Third, when an offeror raises its premium before the expiration of the offer, the offeror must pay the increased consideration to all tendering shareholders.<sup>41</sup> Finally, the Williams Act contains a broad anti-fraud provision which prohibits false or misleading statements and fraudulent, deceptive, or manipulative acts by the offeror, target company, or any other person.<sup>42</sup>

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35. 17 C.F.R. § 240.14d-1 (1979). Section 14(e) of the Securities Exchange Act, 15 U.S.C. § 78n(e) (1976), requires the offeror to disclose all material facts. In *Sonesta Int'l Hotels Corp. v. Wellington*, 483 F.2d 247, 251 (2d Cir. 1973), the court sets forth its definition of materiality: "The materiality of facts allegedly misstated or omitted depends, in turn, upon whether a reasonable investor might have considered them to be important in deciding whether to accept the tender offer." A different standard for materiality was defined in the context of proxy contests in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976): "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449.

36. *See, e.g.*, 17 C.F.R. § 240.14d-100(5) (1979).

37. 15 U.S.C. § 78n(d) (1976).

38. *Id.* § 78n(d)(5).

39. *See* 15 U.S.C. § 78n(d) (1976). *See also A Response to Great Western*, *supra* note 8, at 878-79.

40. 15 U.S.C. § 78n(d)(6) (1976).

41. *Id.* § 78n(d)(7).

42. *Id.* § 78n(e). For an analysis of a tender offeror's standing to sue under § 14(e) see Note, *Standing Under Section 14(e) of the Securities Exchange Act of 1934: May a Tender Offeror Sue for Injunctive Relief*, 8 FORDHAM URB. L. J. 405 (1979-80).



### C. The New SEC Rules

On December 6, 1979, the SEC announced the adoption of new rules regulating tender offers.<sup>43</sup> These rules apply to tender offers commenced on or after January 7, 1980.<sup>44</sup> Under these rules, a public announcement by an offeror through a press release, newspaper advertisement, or public statement which identifies the offeror, the target company, the offering price, and the number of shares constitutes the commencement of a tender offer.<sup>45</sup> The offer will not commence on the date of the public announcement if the offeror withdraws its offer or if the offeror files a schedule 14D-1 with the SEC and contemporaneously disseminates its offering materials to shareholders within five business days of the announcement.<sup>46</sup> If the offeror fails to withdraw its offer or file a schedule 14D-1 with the SEC, he will have "jumped the gun" in violation of section 14(d)(1) of the Exchange Act.<sup>47</sup>

Certain announcements do not result in the commencement of a tender offer. A public announcement which identifies only the offeror and the target company and which states that the offeror intends to make an offer in the future for equity securities without specifying the amount or the price does not constitute the commencement of an offer.<sup>48</sup> Another exception is provided in rule 14d-2(e) for an announcement of a registered exchange offer which discloses only the information specified in rule 135(a)(4) promulgated under the Securities Act of 1933.<sup>49</sup> Such an announcement will not

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43. 44 Fed. Reg. 70,236 (1979) (to be codified in 17 C.F.R. §§ 230, 240). The SEC has also proposed additional rules in 44 Fed. Reg. 70,349 (1979). These proposed rules include a definition of the term "tender offer," provisions requiring equal treatment of security holders in the context of a tender offer, antifraud provisions concerning trading by certain persons on the basis of material non-public information relating to a tender offer, and a prohibition of certain purchases not made by means of a tender offer. The comment period for the proposed rules ended on February 1, 1980.

44. *Id.* at 70,236 (to be codified in 17 C.F.R. § 240.14d-2(b)).

45. *Id.* at 70,340-41 (1979) (to be codified in 17 C.F.R. § 240.14d-2(b)). In most cases, the date of commencement of a tender offer will be the date when an offer or a summary advertisement is first published. *Id.* at 70,340 (1979) (to be codified in 17 C.F.R. § 240.14d-2(a)).

46. *Id.* (to be codified in 17 C.F.R. § 240.14d-2(b)(1)-(2)). In disseminating the tender offer, the offeror may choose either long-form publication of the offer in a newspaper or publication of a summary advertisement in a newspaper. *Id.* at 70,341-42 (1979) (to be codified in 17 C.F.R. § 240.14d-4(a)(1)-(2)). If a summary advertisement is utilized, the offeror must furnish the offering materials to shareholders who request them.

47. 15 U.S.C. § 78(n)(d) (1976).

48. 44 Fed. Reg. 70,341 (1979) (to be codified in 17 C.F.R. § 240.14d-2(d)).

49. Rule 135(a)(4), 17 C.F.R. § 230.135(a)(4) (1979), provides: "In the case of an offering

be deemed to constitute the commencement of a tender offer if the offeror promptly files a registration statement.<sup>50</sup>

Under the new rules, the offeror must file, "as soon as practicable on the date of commencement of the tender offer,"<sup>51</sup> ten copies of a schedule 14D-1 with the SEC.<sup>52</sup> The offeror must hand deliver a copy of schedule 14D-1 to the target company and to any other bidder.<sup>53</sup> The offeror must also give telephonic notice of certain information and forward by first class mail a copy of its schedule 14D-1 to each national securities exchange where the target corporation security is listed and to the NASD if the security is quoted on NASDAQ.<sup>54</sup> Filling an omission in prior law, the new rules require that the target company must either mail the tender offer materials to its shareholders<sup>55</sup> or furnish the current shareholder list to the offeror within two days of the offeror's request to do so.<sup>56</sup>

The rules require the target company to publish a statement disclosing its position with respect to the tender offer within ten business days of the commencement of a tender offer.<sup>57</sup> The statement must recommend acceptance or rejection of the offer, express no opinion and remain neutral towards the tender offer, or state that the target company is unable to take a position with respect to the

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of securities in exchange for other securities of the issuer or of another issuer, the name of the issuer and the title of the securities to be surrendered in exchange for the securities to be offered, the basis upon which the exchange may be made."

50. 44 Fed. Reg. 70,341 (1979) (to be codified in 17 C.F.R. 240.14d-2(e)).

51. *Id.* at 70,341 (1979) (to be codified in 17 C.F.R. 240.14d-3(a)).

52. *Id.* (to be codified in 17 C.F.R. § 240.14d-3(a)(1)).

53. *Id.* at 70,341 (1979) (to be codified in 17 C.F.R. § 240.14d-3(a)(2)).

54. *Id.* at 70,341 (1979) (to be codified in 17 C.F.R. § 240.14d-3(a)(3)). NASD, the National Association of Securities Dealers, Inc., was established as the self-regulatory organization for brokers and dealers engaging in over-the-counter (OTC) securities transactions. The NASDAQ, National Automated Quotation System, utilizes computer equipment to centralize the listing of OTC quotations. S. JAFFE, *BROKER-DEALERS AND SECURITIES MARKETS* 207, 212-13 (1977).

55. 44 Fed. Reg. 70,342 (1979) (to be codified in 17 C.F.R. § 240.14d-5(b)). The Williams Act and prior rules did not contain such a provision.

56. *Id.* at 70,343 (1979) (to be codified in 17 C.F.R. § 240.14d-5(c)). The shareholder list must be given to the bidder within three days of its request or the target company must mail the tender offer materials no later than three business days after the receipt of the tender offer materials. If the target company elects to do the mailing itself, the offeror is required to advance the approximate costs of the mailing to the target company. If the target company furnishes the bidder with its shareholder list, it is not required to disclose the number of shares held by each of its shareholders. The Williams Act and prior rules do not contain such a provision.

57. *Id.* at 70,348 (1979) (to be codified in 17 C.F.R. § 240.14(e)(2)(a)).

offer.<sup>58</sup> If a recommendation to accept or reject is not made, the target company must specify whether it is remaining neutral or is unable to take a position on the offer. Conclusory statements are insufficient.<sup>59</sup> The target company must also disclose, to the extent known, whether any of its executive officers, directors, subsidiaries, or affiliates intend to sell, tender, or hold shares in the target company.<sup>60</sup> This statement is contained in schedule 14D-9.<sup>61</sup>

The information contained in the 14D-9 schedule greatly expands the disclosures required of the target company.<sup>62</sup> The target company must describe any material "contract, agreement, arrangement or understanding" and any "actual or potential conflict of interest" between the offeror and the target company or any of their respective executive officers, directors, or affiliates, unless the information was disclosed in a document filed with the SEC during the prior year, in which case reference may be made to the prior filing.<sup>63</sup> The target company is also required to disclose whether negotiations are proposed or are underway in response to the tender offer which relate to or would have resulted in any of the following: 1) an extraordinary transaction, such as a merger or reorganization, involving the target company or any subsidiary; 2) a sale or transfer of a material amount of assets of the target company or any of its subsidiaries; 3) a tender offer for or other acquisition of the target company's securities; or 4) any material change in the target company's present capitalization or dividend policy.<sup>64</sup> If an agree-

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58. *Id.* (to be codified in 17 C.F.R. § 240.14e-2(a)(1)-(3)). The release states that the reason for this new rule is to address a "problem area" in the field of tender offers. Often management may

state its position when it maximizes its tactical advantage and . . . remain silent when it does not. Such complete discretion increases the likelihood for hasty, ill-considered decision-making by security holders and the possibility for fraudulent, deceptive or manipulative acts or practices by a subject company and others. It is also inconsistent with the neutrality between bidders and subject companies sought to be achieved by the Williams Act.

*Id.* at 70,339.

59. *Id.* at 70,336, 70,347 (1979) (to be codified in 17 C.F.R. § 240.14d-101, item 4). An example of a conclusory statement is: "The tender offer is in the best interest of shareholders." *Id.*

60. *Id.* item 6(b).

61. *Id.* at 70,336, 70,347 (1979) (to be codified in 17 C.F.R. § 240.14d-101).

62. Prior rules and regulations did not require the target company to disclose any information. 17 C.F.R. § 240.14d-1-4, 100 (1976).

63. 44 Fed. Reg. 70,336, 70,347 (1979) (to be codified in 17 C.F.R. § 240.14d-101, item 3(b)).

64. *Id.* at 70,336, 70,347 (1979) (to be codified in 17 C.F.R. § 240.14d-101, item 7).

ment in principle between the offeror and the target has not been reached, the terms of and the parties to the transaction need not be disclosed if in the opinion of the target's board of directors such disclosure would jeopardize the continuation of such negotiations. In such case, disclosure that negotiations are being undertaken and are in the preliminary stages will be sufficient.<sup>65</sup> The target company's schedule 14D-9 must be filed with the SEC as soon "as practicable on the date" the target company's position is first announced to its shareholders.<sup>66</sup>

In addition to these procedural requirements, the rules contain detailed substantive provisions. The new rules extend the minimum offering period to twenty business days.<sup>67</sup> Where the offeror increases the offering price, the offering period following the price increase is ten business days.<sup>68</sup> A tendering shareholder may withdraw his shares during the first fifteen days or after the sixtieth calendar day if his shares have not been purchased.<sup>69</sup> The withdrawal period is extended ten business days after the commencement of a competing offer.<sup>70</sup>

#### D. Effect of the New Rules

One purpose of the SEC in adopting the new tender offer rules is to implement existing statutory requirements<sup>71</sup> by providing specific filing, delivery, and disclosure requirements, and optional dissemination provisions.<sup>72</sup> The majority of these rules will benefit the target company shareholder. For example, rule 14d-2(b),<sup>73</sup> which provides that certain public announcements constitute the commencement of a tender offer, will help to eliminate arbitrage

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65. *Id.*

66. *Id.* at 70,345 (1979) (to be codified in 17 C.F.R. § 240.14d-9).

67. *Id.* at 70,348 (1979) (to be codified in 17 C.F.R. § 240.14e-1(a)). The Williams Act did not specify a minimum offering period. Nevertheless, tender offers usually remained open for at least ten calendar days since section 14(d)(6) of the Exchange Act provides for an initial proration period of ten calendar days in a prorated offer, section 14(d)(5) of the Exchange Act provides for an initial withdrawal period of seven calendar days. 15 U.S.C. § 78(n)(d)(5)-(6).

68. *Id.* (to be codified in 17 C.F.R. § 240.14e-1(b)).

69. *Id.* at 70,345 (1979) (to be codified in 17 C.F.R. 240.14d-7(a)(1)).

70. *Id.* (to be codified in 17 C.F.R. § 240.14d-7(a)(2)).

71. These requirements are contained in the Williams Act, 15 U.S.C. § 78n(d)(1976) and rules and regulations thereunder, 17 C.F.R. § 240.14d-1-4, 100 (1979).

72. 44 Fed. Reg. 70,326 (1979).

73. See notes 45-50 *supra* and accompanying text.

activity<sup>74</sup> which is often triggered by a pre-commencement public announcement. This activity entails the purchase of a target's shares at the lower open market price for the purpose of tendering such shares at the higher tender price.<sup>75</sup> In addition, rule 14d-5,<sup>76</sup> which requires that the target company either furnish current stockholder lists to the offeror or mail the tender offer materials to the shareholders, will provide for timely receipt of the tender offer materials by the shareholders. This should aid shareholders in reaching informed investment decisions. Also, schedule 14D-9,<sup>77</sup> which contains disclosures of the target company's position with respect to the tender offer, will provide more meaningful information to the shareholder in his evaluation of the tender offer. Thus, the effect of filing a schedule 14D-9 will be to protect investors.

A second purpose of the new rules is to reinforce the position that the Williams Act is designed to maintain a balance between the interests of the target company and the bidder.<sup>78</sup> The extension of the minimum offering period to twenty business days<sup>79</sup> will benefit the target company by giving it the time necessary to formulate a response to a tender offer. However, the disclosure requirements in schedule 14D-9<sup>80</sup> will burden the target company with the requirements of extensive disclosures and recommendations concerning the offer. Similarly, rule 14d-5<sup>81</sup> burdens the target company by requiring either production of shareholder lists or the actual mailing of tender offer materials to its shareholders.

It is probable that the enactment of the rules, particularly rule 14d-101,<sup>82</sup> which requires the target company to make certain dis-

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74. Arbitrage activity refers to stock purchases by speculators in one market and the near-simultaneous sale of the same property in another or the same market to generate a profit. The arbitrageur attempts to purchase the target's shares at the lower open market price for the purpose of tendering such shares at the higher tender price. This has an adverse effect on tendering shareholders by reducing the number of their shares which were accepted in prorated cash offers. This prompted the SEC to adopt rule 10b-4 which prohibits short-tendering. See ARANOW & EINHORN, *supra* note 2 at 173-91.

75. *Id.*

76. See notes 55-56 *supra* and accompanying text. One problem during the 1960's was that in a contested bid, the bidder's effort to secure a stockholder's list was often met with legal action to block the attempt. See Hayes & Taussig, *supra* note 16, at 41.

77. See notes 57-66 *supra* and accompanying text.

78. See note 26 *supra*.

79. See note 67 *supra*.

80. See notes 62-66 *supra* and accompanying text.

81. See notes 55-56 *supra* and accompanying text.

82. 44 Fed. Reg. 70,336, 70,347 (1979) (to be codified in 17 C.F.R. § 240.14d-101).

closures to its shareholders on schedule 14D-9, will cause an increase in litigation. Because the target company is required to make detailed disclosures, there is a greater possibility of its making untrue statements or omitting material facts.<sup>83</sup>

## II. State Takeover Statutes

Since 1968, at least thirty-seven states have enacted statutes<sup>84</sup> that regulate tender offers.<sup>85</sup> State statutes govern tender offers when the target corporation is incorporated under the laws of the state.<sup>86</sup> Many statutes, however, also apply to corporations which have substantial assets or a principal place of business in the state.<sup>87</sup> Thus, many statutes have an extra-territorial effect because they may apply to a corporation whether its shareholders live within or without the state.<sup>88</sup> Under most state statutes, filing of disclosure statements must be made ten days before the offer can become effective,<sup>89</sup> although Hawaii, for example, requires that the

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83. Numerous cases have been litigated under Section 14(e) of the Williams Act which makes it unlawful for any person to make an untrue statement of a material fact or omit to state a material fact in the context of a tender offer. *See, e.g.,* Sonesta Int'l Hotels Corp. v. Wellington Assocs., 483 F.2d 247 (2d Cir. 1973); Gulf & Western, Inc. v. A&P, 476 F.2d 687 (2d Cir. 1973); Commonwealth Oil Ref. Co. v. Tesoro Petroleum Corp., 394 F. Supp. 267 (S.D.N.Y. 1975); Ronson Corp. v. Liquifin Aktiengesellschaft, 370 F. Supp. 597 (D.N.J. 1974); Texasgulf, Inc. v. Canada Development Corp., 366 F. Supp. 374 (S.D. Tex. 1973); General Host Corp. v. Triumph Am. Inc., 359 F. Supp. 749 (S.D.N.Y. 1973). In *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973), the court set the standard for determining liability under section 14(e). Plaintiff must establish that defendant "either (1) knew the material facts that were misstated or omitted, or (2) failed or refused to ascertain such facts when they were available to him or could have been discovered by him with reasonable effort." *Id.* at 364.

84. *See* note 7 *supra*.

85. The tender offer definition under state law is the same as the definition under federal law, except that the percentage of stock varies. For example, Minnesota defines a takeover offer as an offer to acquire any equity securities of a target company pursuant to a tender offer if after the acquisition of securities the offeror would be the beneficial owner of more than *ten percent* of any class of the outstanding equity securities of the target company. MINN. STAT. ANN. § 80B.01(8) (West Supp. 1979).

86. *See, e.g.,* DEL. CODE ANN. tit. 8 § 203(c)(2) (Supp. 1978); NEV. REV. STAT. § 78.3765 (1973).

87. *See, e.g.,* N.J. STAT. ANN. § 49:5-2m (West Supp. 1979) (incorporated or principal place of business or substantial assets in state) and N.Y. BUS. CORP. LAW § 1601(a) (McKinney Supp. 1979) (incorporated or principal place of business and substantial assets in state).

88. An offeror could avoid a state takeover statute by making an offer only to non-residents if a state only regulated offers to its residents. ARANOW & EINHORN, *supra* note 2, at 157.

89. *See* ARK. STAT. ANN. § 67-1264.2 (Supp. 1979); NEV. REV. STAT. § 78.3771 (1973); S.D. COMP. LAWS ANN. § 47-32-21 (Supp. 1979).

filings be made sixty days prior to the offer.<sup>90</sup> Many statutes provide that the offer may be delayed by the state securities commission.<sup>91</sup> These agencies can, on their own motion, order a hearing on the offer. In many cases, such hearings will be held at the request of the target company.<sup>92</sup> The state statutes have disclosure requirements which differ from those contained in the Williams Act.<sup>93</sup> While some statutes require an offeror to make disclosures similar to those required under the Williams Act,<sup>94</sup> many others require that an offeror make more extensive disclosures.<sup>95</sup>

State takeover statutes generally contain enforcement provisions and remedies. Many statutes empower the state securities commission to issue both cease and desist orders and injunctions.<sup>96</sup> A violation of these statutes may result in criminal prosecution, fines, or civil liability.<sup>97</sup>

The takeover statutes also have varying substantive requirements. There are differing provisions on the minimum offering period,<sup>98</sup> extension of this period after an amendment to the filing,<sup>99</sup> the withdrawal rights of shareholders,<sup>100</sup> and the time within which the offeror must accept the tendered shares *pro rata*.<sup>101</sup>

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90. HAWAII REV. STAT. § 417E-3(f) (1976).

91. See note 92 *infra*.

92. See KAN. STAT. ANN. § 17-1281 (1974); N.H. REV. STAT. ANN. § 421-A:5 (Supp. 1977); VA. CODE § 13.1-531(a)(ii) (Supp. 1979).

93. See notes 94-95 *infra*.

94. See COLO. REV. STAT. §§ 11-51.5-104 (Cum. Supp. 1978); FLA. STAT. ANN. § 517.355(2)(a)(1) (1979).

95. See, e.g., N.J. STAT. ANN. § 49:5-3(b) (West Supp. 1979); GA. CODE ANN. § 22-1902 (1977); ILL. ANN. STAT. ch. 121 ½ § 137. For example, the Georgia statute requires that financial statements be filed. GA. CODE ANN. § 22-1902(b)(6)(B) (1977).

96. See, e.g., N.H. REV. STAT. ANN. § 421-A:11 (Supp. 1977).

97. See, e.g., KY. REV. STAT. § 292.991 (Supp. 1978); MISS. CODE ANN. §§ 75-72-19, -21 (Supp. 1979); WIS. STAT. ANN. §§ 552.19, .21 (West Special Pamphlet 1979).

98. COLO. REV. STAT. § 11-51.5-103(b) (Cum. Supp. 1978) (15 days offering period); 70 PA. CONS. STAT. ANN. § 74(d) (Purdon Supp. 1979) (offer becomes effective in 20 days).

99. IOWA UNIFORM SECURITIES ACT § 502.212(8) (1979), 1A BLUE SKY L. REP. (CCH) ¶ 18,162 (14 days after an amendment); DEL. CODE ANN. tit. 8, § 203(a)(2) (Cum. Supp. 1978) (10 days after an amendment).

100. See, COLO. REV. STAT. § 11-51.5-103(c) (Cum. Supp. 1978) (withdrawal within 15 days and after 35 days); VA. CODE § 13.1-530(b) (Supp. 1979) (withdrawal within 7 days and after 60 days); FLA. STAT. ANN. § 517.353(3) (Supp. 1979) (withdrawal within 15 days and after 60 days).

101. DEL. CODE ANN. tit. 8, § 203(a)(3) (Cum. Supp. 1978) (within 20 days after a tender offer is made and within 10 days after an amendment to the tender offer); ARK. STAT. ANN. § 67-1264.5(3) (Cum. Supp. 1979) (within 10 days).

Although the purported purpose of the state takeover statutes is to protect investors,<sup>102</sup> the main effect of the statutes is to protect target company management from unfriendly tender offers.<sup>103</sup> If a securities commission hearing is called, there is a delay of the offer pending investigation. For example, under the Kentucky statute,<sup>104</sup> either a director of the securities commission or the target company may request a hearing within ten days following the filing by the offeror. The hearing must be held within forty days and a judgment must be made within sixty days of the filing. Consequently, a possible sixty day delay of an offer may result. In addition, state filing requirements which require advance notice of a tender offer, as in Hawaii,<sup>105</sup> allow target company management the time to devise strategies to defeat the offer. Moreover, delay may discourage tender offers<sup>106</sup> because it gives the target company time to organize defensive measures.<sup>107</sup> The potential for delay can increase the likelihood of irregular stock price fluctuations. Sizeable price fluctuations often cause the SEC to halt trading in the target company's securities between the time the offer is filed and first published.<sup>108</sup> This can have an adverse nationwide impact and may inject uncertainty into the tender offer situation.<sup>109</sup> Both the hearing and the advance notice provisions protect management because they eliminate speed and surprise which frequently comprise critical elements of a successful tender offer.<sup>110</sup>

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102. See Appellant McEldowney's argument in *Great Western*, 577 F.2d at 1279.

103. See *State Securities Regulation*, *supra* note 8, at 767. The effect of state takeover statutes' advance notice and hearing provisions has been to delay the tender offer thereby giving incumbent management time to defeat an unfriendly tender offer. *Id.*

104. KY. REV. STAT. §§ 292.570, .580 (Supp. 1978).

105. HAWAII REV. STAT. § 417E-3(F) (1976).

106. See ARANOW & EINHORN, *supra* note 2, at 234-76. Defensive tactics include: a target's repurchases of its own shares, open market purchases of the target shares by friendly third parties, dividend increases, stock splits, issuance of additional shares, defensive mergers, discriminatory voting provisions, triggering state takeover statutes, legal action, publicity and restrictive loan agreements. *Id.*

107. See Sommer, *Commentary*, 32 BUS. LAW. 1486 (1976). Statement of Joseph Flom at an ABA National Institute before a panel on state takeover statutes and new takeover strategies. A Report of the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187 (1976); Sommer, *The Ohio Takeover Act; What is it?* 21 CASE W. RES. L. REV. 681, 720 (1970).

108. See *The Tender Trap*, *supra* note 8, at 10-11.

109. *Id.* at 11.

110. See Moylan, *supra* note 8, at 691-92; Hayes & Taussig, *supra* note 16, at 139. Another effect of the state statutes is that their additional requirements expand the number of



### III. The Preemption Doctrine

The fundamental theory of the supremacy clause<sup>111</sup> of the Constitution is that federal law may preempt state law.<sup>112</sup> While the preemption doctrine is complex and requires a careful analysis of state and federal laws,<sup>113</sup> the current judicial trend is to allow concurrent state-federal regulation.<sup>114</sup> The Supreme Court's most recent decisions suggest that state legislation will be allowed to stand<sup>115</sup> if Congress has not clearly indicated its intention to preempt or a conflict is peripheral to the purpose of the federal statute. Congressional intent to preempt state law may be explicit.<sup>116</sup> In addition, where the federal regulation represents a "pervasive scheme"<sup>117</sup> or

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legal grounds on which an offer may be resisted. *See Statutes Reconsidered*, *supra* note 8, at 517, and sources cited therein.

111. The Supremacy Clause of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, § 2.

112. On the preemption doctrine, *see generally Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

113. *See Note, A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

114. *See Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COL. L. REV. 623 (1975) [hereinafter cited as *The Preemption Doctrine*]; *Note, Environmental Law: A Reevaluation of Federal Pre-Emption and the Commerce Clause*, 7 FORDHAM URB. L. J. 649 (1979). *See generally* Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) (federal patent law does not preempt state contract law so as to preclude enforcement of the contract); *De Canas v. Bica*, 424 U.S. 351 (1976) (California Labor Code which prohibits an employer from knowingly employing an alien is not unconstitutional or preempted by the Immigration & Nationality Act); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (Ohio's trade secret law is not preempted by federal patent laws); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117 (1973) (exchange rules do not preempt California law); *New York Dep't of Social Service v. Dublino*, 413 U.S. 405 (1973) (WIN provisions of Social Securities Act do not preempt New York work rules); *Goldstein v. California*, 412 U.S. 546 (1973) (California statute concerning record privacy is upheld and does not interfere with federal copyright law).

115. *The Preemption Doctrine*, *supra* note 114, at 653.

116. *Sears Roebuck & Co. v. Stiffel*, 376 U.S. 225 (1964) (federal patent law expressly preempts state law of unfair competition); *Chemical Specialties Mfrs. Ass'n Inc. v. Clark*, 482 F.2d 325 (5th Cir. 1973) (Federal Hazardous Substances Labeling Act expressly supersedes any state or local "precautionary labeling" law which differs from its requirements).

117. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). *See Hines v. Davidowitz*, 312 U.S. 52 (1941) (1940 Alien Registration Act was comprehensive system for alien registration and preempted state law); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The Smith Act as amended supersedes the enforceability of the Pennsylvania Sedition Act. "Looking to all

where the federal interest in the subject matter of the regulation is dominant,<sup>118</sup> preemption may be inferred. Finally, a state law may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>119</sup>

### A. Explicit and Implicit Preemption of State Takeover Laws

Congress has not expressly prohibited the states from regulating tender offers.<sup>120</sup> It is suggested that section 28(a)<sup>121</sup> of the Exchange Act permits non-conflicting state regulation of securities.<sup>122</sup> The section provides that: "Nothing in this chapter shall affect the jurisdiction of the securities commission . . . of any state over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."<sup>123</sup> In *Great Western United Corp. v. Kidwell*,<sup>124</sup> the court stated: "Nothing in the 1934 Act explicitly preempts all state takeover legislation; indeed, section 28 has a contrary tone."<sup>125</sup> Others have argued, however, that this type of savings clause is inapplicable to the preemption question in the tender offer area because section 28 was part of the original Exchange Act and was designed to protect state Blue Sky Laws, not takeover statutes.<sup>126</sup>

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of [these Acts] in the aggregate, the conclusion is inescapable that Congress has intended to occupy the field of sedition." *Id.* at 504.

118. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1946). *See, e.g.*, *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). "Congress having thus treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem." *Id.* at 505.

119. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See, e.g.*, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1976) (federal statute preempts state statute regulating weight labeling of flour); *Perez v. Campbell*, 402 U.S. 637 (1971) (state law which does not relieve a judgment debtor in automobile accident case directly conflicts with Bankruptcy Act which states that a discharge in bankruptcy fully discharges all but certain specified judgments).

120. There is no express language of preemption in the Williams Act. Neither is there any discussion of preemption in the legislative history of the Williams Act. *See H.R. REP. NO. 1711, 90th Cong., 1st Sess. 2 (1968) reprinted in [1968] U.S. Code Cong. & Ad. News 2811; S. REP. NO. 550, 90th Cong., 1st Sess. (1967).* It is likely the preemption question was not considered prior to the passage of the Williams Act because no state takeover statutes had, as yet, been enacted.

121. 15 U.S.C. § 78 bb(a) (1976).

122. *See A Response to Great Western*, *supra* note 8, at 909; *Statutes Reconsidered*, *supra* note 8, at 519 n.63. "Nothing in the 1934 Act explicitly preempts all state takeover legislation; indeed, § 28 has a contrary tone." 577 F. 2d at 1275.

123. 15 U.S.C. § 78bb(a) (1976).

124. 577 F.2d 1256 (5th Cir. 1978), *rev'd on venue grounds sub nom. Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

125. *Id.* at 1257.

126. *See Langevoort*, *supra* note 8, at 247. The author also suggests that state takeover

Congressional preemption may be inferred where "[t]he scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."<sup>127</sup> In *City of Burbank v. Lockheed Air Terminal, Inc.*,<sup>128</sup> a city curfew of jet flights was held to be unconstitutional.<sup>129</sup> The Court held that the Noise Control Act of 1972 "reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise preempting state and local control."<sup>130</sup> Although a question previously existed as to whether the Williams Act established a pervasive scheme of federal regulation sufficient to infer preemption,<sup>131</sup> the Act, *coupled with* the new rules and regulations, is such a pervasive scheme. The Williams Act is a minimum disclosure statute which provides for filing with the SEC and contains four substantive provisions: seven day withdrawal rights, ten day pro rata acceptance, equal consideration to all tendering shareholders, and an anti-fraud provision.<sup>132</sup> State takeover statutes were enacted to fill gaps left by the Williams Act.<sup>133</sup> For example, the Williams Act did not contain a minimum offering period.<sup>134</sup> As a result target management and shareholders were deprived of the time to assess the offer and to organize defensive measures.<sup>135</sup> In light of the new SEC rules, however, many of the gaps in the Act are closed, and, as a consequence, the state statutes are superfluous. The new rules establish what acts constitute the commence-

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statutes are more akin to "corporation" law than to "securities" law and that it is too mechanical to intimate that the savings clause was intended to save this more aggressive state legislation. The author submits that where subsequent legislation is not of the same character as the laws Congress intended to save, the savings clause will not protect subsequent state law. *Id.*

127. See note 117 *supra*.

128. 411 U.S. 624 (1972).

129. *Id.* at 633.

130. *Id.*

131. Compare *Statutes Reconsidered*, *supra* note 8, at 519-20; *A Response to Great Western*, *supra* note 8, at 910-11; and *Langevoort*, *supra* note 8, at 248; (Williams Act is not a pervasive scheme of federal regulation); with *The Tender Trap*, *supra* note 8, at 29. The authors argue that the Williams Act as integrated into the Exchange Act is a comprehensive federal regulatory scheme and therefore preempts state takeover statutes.

132. See text accompanying notes 32-42 *supra*.

133. See Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187, 188 (1976).

134. See 15 U.S.C. § 78n(d) (1976); 17 C.F.R. § 240.14d-1, -4 (1979).

135. See note 106 *supra*.

ment of a tender offer<sup>136</sup> and the length of the minimum offering period.<sup>137</sup> The new rules also require the target company to furnish shareholder lists to the bidder or mail the offering materials to the shareholders.<sup>138</sup> In sum, the new rules coupled with the Williams Act establish pervasive federal regulation, one criterion of implicit preemption.

Congressional preemption may also be inferred where a dominant federal interest in the subject matter of the regulation is demonstrated.<sup>139</sup> The federal interest in the securities market is not dominant, however, as exemplified by state Blue Sky Laws which remain in existence.<sup>140</sup>

## B. Operational Preemption

Federal law will prevail when a conflict between federal and state laws makes compliance with both impossible<sup>141</sup> and when the purpose of the state statute conflicts with the federal law.<sup>142</sup> There are numerous conflicts between the new tender offer rules and state takeover statutes, the most glaring of which is the discrepancy between state advance notice provisions<sup>143</sup> and rule 14d-2(b). The federal rule provides that a public announcement by a bidder constitutes the commencement of a tender offer.<sup>144</sup> Numerous state statutes, including those of Arkansas and Nevada,<sup>145</sup> require publication or public filing of an offer before the offer may be com-

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136. See notes 45-50 *supra*.

137. See note 67 *supra*.

138. See notes 55-56 *supra*.

139. See note 118 *supra*.

140. See *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 557-59 (1917) (Ohio Blue Sky Law upheld); *Caldwell v. Sioux Falls Stock Yards Co.*, 242 U.S. 559, 567-68 (1917) (South Dakota Blue Sky Law upheld); *Merrick v. Halsey & Co.*, 242 U.S. 568 (1917) (Michigan Blue Sky Law upheld). Concurrent jurisdiction in the securities field was reaffirmed in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Ware*, 414 U.S. 117 (1973), where the Court held that New York Stock Exchange Rules calling for the arbitration of any controversies arising out of the termination of employment did not preempt wage relief under California law. *Id.* at 136. The court stated that there was no need for national uniformity under federal securities policy in the area of wage claims. *Id.*

141. *Free v. Bland*, 369 U.S. 663 (1962) (Treasury Regulations creating a right of survivorship preempt inconsistent provision of Texas community property law); *McDermott v. Wisconsin*, 228 U.S. 115 (1913).

142. See note 119 *supra*.

143. See notes 89-90 *supra*.

144. See notes 45-50 *supra*.

145. See ARK. STAT. ANN. § 67-1264 to -1264.14 (Supp. 1979); NEV. REV. STAT. § 78.3771 (1973).

menced.<sup>146</sup> These conditions precedent to an effective offer under state law will trigger the commencement of the tender offer under rule 14d-2(b).<sup>147</sup> Because the federal provisions on the minimum offering period, proration rights, and withdrawal periods are predicated upon the commencement of the tender offer,<sup>148</sup> these periods will not coincide with those provided under state law.

In issuing the new rules, the SEC expressed its intention to preempt state takeover statutes where there are conflicting provisions.<sup>149</sup> The regulations state:

Thus, the conflict between Rule 14d-2(b) and such state statutes is so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist. While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes presently in effect frustrate the operation and purposes of the Williams Act and that, based upon the abuses in current tender offer practice discussed above, Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act.<sup>150</sup>

The federal rule on pro rata acceptance of shares differs from the rule that presently exists in some states. The Williams Act requires only that those securities tendered within the first ten days of an offer be purchased on a pro rata basis.<sup>151</sup> In contrast, the Nevada statute requires that offerors prorate tenders for the duration of the offer.<sup>152</sup> Under the federal rule, shareholders who tender their securities ten days after an offer is made will have their shares accepted on a first-come, first-served basis. However, in Nevada, a shareholder who tenders his shares ten days after the offer is made and whose shares are not taken up may assert his right to have his shares prorated under state law. The offeror would then be required

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146. See note 145 *supra*.

147. 44 Fed. Reg. 70,340-41 (1979) (to be codified in 17 C.F.R. § 240.14d-2(b)).

148. See notes 67-70 *supra* and accompanying text.

149. See 44 Fed. Reg. 70,329-30 (1979). In a recent interview, SEC Commissioner Pollack stated that: "To the extent that our rules are inconsistent with provisions in some state laws, the provisions of our rule would, of course, be applicable rather than the state provisions . . . To put it another way, the state provision will have to kneel to the rule that we ultimately adopt." *New Rules Will Further Existing SEC Goals*, N.Y.L.J., Dec. 17, 1979, at 35, col. 3.

150. 44 Fed. Reg. 70,329-30 (1979).

151. 15 U.S.C. § 78n(d)(6) (1976).

152. NEV. REV. STAT. § 78.3772(3) (1973).

to purchase more shares than originally desired.<sup>153</sup> Some state rules conflict with the federal rule governing the minimum offering period. Rule 14e-1 provides for a minimum offering period of twenty business days.<sup>154</sup> The Colorado statute, for example, provides for a minimum offering period of fifteen calendar days.<sup>155</sup> Also, the new rules provide for a fifteen day withdrawal period.<sup>156</sup> The Florida statute permits the tendering shareholder to withdraw deposited securities within fifteen days of the tender offer and again after sixty days.<sup>157</sup>

A state statute may also be invalid when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>158</sup> The state takeover statutes protect incumbent management and represent local interest legislation.<sup>159</sup> The Arkansas and New Hampshire statutes, which provide for hearings and advance notice to the target company,<sup>160</sup> delay an offer and thereby give management time to prepare strategies to defeat an unfriendly offer.<sup>161</sup> This conflicts with the purported purpose of both the Williams Act and the new rules, which seek to maintain neutrality between the offeror and the target company

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153. Wilner & Landy, *supra* note 8, at 31.

154. See note 67 *supra*.

155. COLO. REV. STAT. § 11-51.5-103(b) (Cum. Supp. 1978).

156. See note 69 *supra*.

157. FLA. STAT. ANN. § 517.353(3) (Supp. 1978).

158. *Hines v. Davidowitz*, 312 U.S. at 67 (1941). See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977) (federal law governing net-weight labeling of flour preempts California statute).

159. See *State Securities Regulation*, *supra* note 8, at 767; Sommer, *The Ohio Takeover Act: What is it?*, 21 CASE W. RES. L. REV. 681 (1970). "Careful analysis of [the Ohio] Act would suggest that it is 'special interest' legislation sailing under different colors, weighted obviously to protect incumbent management from attack." *Id.* at 720. See also Note, *Takeover Bids in Virginia*, 26 WASH. & LEE L. REV. 323 (1969). "[I]t is submitted that the Virginia statute while attempting to cure one evil creates only another- the further entrenchment of inefficient corporate management." *Id.* at 335. While it is asserted that the state takeover statutes were designed to protect investors, the apparent effect of these statutes has been to protect management. See notes 102-10 *supra* and accompanying text.

160. ARK. STAT. ANN. §§ 67-1264.2(2), (5) (Supp. 1979); N.H. REV. STAT. ANN. §§ 421-A:3, A:5 (1977).

161. See notes 105-07 *supra* and accompanying text. It has been argued that delay frequently also benefits shareholders. It encourages an auction market for the target company's stock resulting in a higher premium for shareholders. Robinson, *Directors under Attack in New 'Bear Hug' Mergers*, N.Y.L.J., June 12, 1978, at 25, col. 1, 41, col. 1. Former SEC Commissioner Sommer states that in some cases delays caused by state statutes have resulted in a higher premium for target company shareholders. *Commentary*, 32 BUS. LAW. 1486 (1977).

and foster more complete disclosure for the benefit of target company shareholders.<sup>162</sup>

Three recent court decisions, decided prior to the effective date of the new rules, have invalidated state takeover statutes found to be in conflict with the purpose of the federal law. In *Great Western United Corp. v. Kidwell*,<sup>163</sup> the Court of Appeals for the Fifth Circuit held that the Idaho Takeover Statute was preempted by the Williams Act because the statute's purpose to protect incumbent management directly conflicted with the federal objective of investor protection.<sup>164</sup> The Idaho statute requires substantially more disclosure by the offeror than does the Williams Act.<sup>165</sup> The court argued that disclosure of a mass of irrelevant data can confuse the investor and obscure relevant disclosures.<sup>166</sup> Thus, these provisions impede the federal objective of aiding investors in making informed investment decisions, and disrupted the "neutrality indispensable for the proper operation of the federal market approach to tender offers regulation."<sup>167</sup> The court rejected appellant's argument that the advance warning and additional time provided by the Idaho law allowed target directors the opportunity to fulfill their fiduciary duties to shareholders "by studying the offer and either negotiating better terms or making a recommendation based on shareholder's interests."<sup>168</sup> The court noted that instead of allowing investors to reach investment decisions based on full disclosure by the offeror,

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162. See H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2811; S. REP. NO. 550, 90th Cong., 1st Sess. 2, (1967). See generally Note, *The Courts and the Williams Act: Try a Little Tenderness*, 48 N.Y.U.L. REV. 991 (1973); Bromberg, *The Securities Law of Tender Offers*, 15 N.Y.L.F. 462 (1969).

163. 577 F.2d 1256 (5th Cir. 1978), rev'd on venue grounds sub nom. *Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

164. *Id.* at 1274-87.

165. See IDAHO CODE §§ 30-1501 to -1513 (Supp. 1979) (repealed 1979).

166. 577 F.2d at 1274-87. The Williams Act required minimum disclosure by the offeror. The Idaho statute requires significantly greater disclosure by the offeror and can thus confuse the shareholder. The court's analysis in *Great Western* differs from the court's analysis in *Krouse*. See notes 186-95 *infra*. The Idaho and Ohio statutes are very similar. Both contain advance notice and hearing provisions. Nevertheless, the courts came to opposite conclusions. It seems that the analysis by the *Great Western* court is superior. The difference in court attitudes is perhaps the best explanation for the differing results.

167. *Id.* at 1279-80.

168. *Id.* at 1279. Corporate directors owe a fiduciary duty towards the shareholders. Appellant argued that the advance warning and additional time provided by the Idaho statute give target directors the opportunity to fulfill their fiduciary duty to shareholders by studying the offer and either negotiating better terms or making a recommendation based on the stockholders' interests. *Id.* at 1279.

the Idaho statute allowed corporate directors to make such decisions.<sup>169</sup> The court states that this "fiduciary approach" of protecting investors has been rejected by Congress.<sup>170</sup> The court held that Idaho's statute was preempted because the "market approach" of the Williams Act and the "fiduciary approach" of the Idaho statute are incompatible.<sup>171</sup>

In *Dart Industries, Inc. v. Conrad*,<sup>172</sup> the District Court for the Southern District of Indiana held that the Delaware Tender Offers Act was preempted by the Williams Act.<sup>173</sup> The Delaware Act provided for twenty day pre-offer notification to the target company.<sup>174</sup> The court held that the Delaware Act contravened the purpose of the Williams Act by providing substantial advantages to incumbent management's efforts to defeat a tender offer.<sup>175</sup> Moreover, specific provisions of the Delaware Act, particularly the provisions for twenty day pre-offer notification and the twenty day minimum offering period, directly conflicted with the Williams Act.<sup>176</sup> The court noted that Congress had specifically rejected a proposal requiring offerors to give twenty days advance notice to the target company<sup>177</sup> and cited *Great Western* with approval.<sup>178</sup>

In *Televest, Inc. v. Bradshaw*,<sup>179</sup> the Eastern District of Virginia invalidated a provision of the Virginia Takeover Act, which applies the Act to open-market, unsolicited purchases. In its view, the Virginia Act conflicted with the Williams Act<sup>180</sup> because it defined a takeover bid as an open market purchase of more than one percent of the outstanding shares of a class of securities if the securities have been acquired during the preceding six months.<sup>181</sup> Under section 14 of the Exchange Act, such an open market transaction would not constitute a tender offer.<sup>182</sup> The court stated that Con-

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169. *Id.*

170. *Id.*

171. *Id.*

172. 462 F. Supp. 1 (S.D. Ind. 1978).

173. *Id.* at 12-14. The court also based its holding on commerce clause grounds.

174. DEL. CODE ANN. tit. 8, § 203(1)(a)(1978).

175. 462 F. Supp. at 12-13.

176. *Id.* at 13.

177. *Id.* at 12.

178. *Id.*

179. [Current] FED. SEC. L. REP. (CCH) § 97,154 (E.D. Va. Sept. 3, 1979).

180. *Id.* at 96,370-71.

181. VA. CODE ANN. § 13.1-529(b)(iii) (1979).

182. See 15 U.S.C. § 78n(d) (1976).



gress did not intend that open market transactions be regulated as tender offers.<sup>183</sup> Therefore, the purpose of the Williams Act conflicted with the purpose of the Virginia statute provision.<sup>184</sup>

In contrast with the foregoing decisions, both the Ohio and the Indiana statutes have recently been upheld.<sup>185</sup> In *AMCA International Corp. v. Krouse*,<sup>186</sup> the court considered several provisions in the Ohio takeover law.<sup>187</sup> This law requires greater disclosure by the bidder than that required by the Williams Act. Further, it requires twenty days advance notice to the target company and provides for administrative review.<sup>188</sup> The court did not find any direct conflict between federal and state law, as "an offeror who proceeds under the Ohio law encounters no proscriptions of the Williams Act and is not hindered from meeting its obligations under the federal statute."<sup>189</sup> The Ohio law should be preempted under the new rules. Ohio's provision for notice directly conflicts with rule 14d-2(b) which provides that this type of advance warning would constitute the commencement of a tender offer.<sup>190</sup>

In *AMCA*, the Ohio district court concluded that the Ohio law was not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>191</sup> The court stated there was no indication that the Ohio law discouraged tender offers.<sup>192</sup> Nevertheless, it is clear that, when contrasted to the SEC rules

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183. [Current] FED. SEC. L. REP. (CCH) 96,371.

184. *Id.*

185. The Massachusetts Takeover Act was challenged but the court did not reach the merits since the acquiring corporation withdrew its offer. *Tyco Laboratories, Inc. v. Connelly*, 473 F. Supp. 1157 (D. Mass. 1979). Similarly, the court did not decide on the constitutionality of the Maine Takeover Law in *UV Industries, Inc. v. Posner*, 466 F. Supp. 1251 (S.D. Me. 1979). Ohio Attorney General William Brown, on behalf of the Ohio Division of Securities, filed suit against the SEC seeking to invalidate the new SEC rule 14d-2 on the grounds that the Ohio provision for twenty days advance notice gives investors greater protection than the SEC rules by giving the state and investors a longer time to review the proposal. *Ohio v. SEC*, No. C 2-80-111 (S.D. Ohio, filed Feb. 15, 1980). The Commission also contends that the SEC is obligated by principles of regulatory authority. The plaintiffs seek a declaratory judgment invalidating the SEC regulation. Marcus, *Conflict in Takeover Laws Prompts Ohio to Sue SEC*, Nat'l L. J., Mar. 3, 1980, at 8, col. 2; Wall St. J., Feb. 19, 1980, at 18, col. 2.

186. 48 U.S.L.W. 2441 (S.D. Ohio Dec. 21, 1979).

187. *Id.* at 2441-42.

188. *Id.*

189. *Id.* at 2441.

190. OHIO REV. CODE ANN. § 1707.04.1(b) (1979).

191. 48 U.S.L.W. 2441 (S.D. Ohio Dec. 21, 1979).

192. *Id.* at 2442.

which protect the investor, the Ohio statute seeks to protect incumbent management.<sup>193</sup> Through the advance notice and hearing provisions,<sup>194</sup> the Ohio takeover statute gives target management time to defeat an unfriendly tender offer, thereby protecting incumbent management. The SEC rules contain neither advance notice, nor hearing provisions.<sup>195</sup> Thus, under a direct conflict or implicit preemption analysis, the Ohio law would be preempted by the SEC rules.

In *City Investing Co. v. Simcox*,<sup>196</sup> the United States District Court for Southern Indiana upheld the Indiana Takeover Offers Act.<sup>197</sup> The court held that the state takeover statute's provisions for advance notice and hearings did not conflict with the rights of a bidder to make a tender offer under the Williams Act.<sup>198</sup> The court concluded that there was no preemption since the provisions of the state takeover statute are different from those of the Williams Act.<sup>199</sup>

In light of the new SEC rules, this state takeover statute is preempted. The Indiana statute's provisions for hearings and advance notice to the target company prior to the commencement of a tender offer conflict with rule 14d-2(b) of the SEC rules which provides that a public announcement constitutes the commencement of a tender offer.<sup>200</sup> Furthermore, the purpose of the state takeover statute, protection of incumbent management,<sup>201</sup> conflicts with the purpose of the SEC rules as demonstrated above.<sup>202</sup> Therefore, the Indiana statute stands as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>203</sup>

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193. See Sommer, *The Ohio Takeover Act: What is it?*, 21 CASE W. RES. L. REV. 681-82 (1970); ARANOW & EINHORN, *supra* note 2, at 153-72, 265-66.

194. OHIO REV. CODE ANN. § 1707.04.1(b) (1979).

195. See 44 Fed. Reg. 70,236 (1979) (to be codified in 17 C.F.R. §§ 230, 240).

196. 514 SEC. REG. & L. REP. (BNA) A-11 (July 27, 1979).

197. *Id.* at A-12.

198. *Id.*

199. *Id.*

200. IND. CODE ANN. § 23-2-3.1-3 to -7 (Burns Supp. 1979).

201. Provisions for advance notice and hearing protect incumbent management in that delay gives management time to establish defensive measures against an unfriendly tender offer.

202. See notes 158-62 *supra* and accompanying text.

203. See note 158 *supra*.

### Conclusion

Federal administrative rules can preempt conflicting state law.<sup>204</sup> The newly promulgated SEC rules preempt state takeover laws because they represent a pervasive scheme of federal regulation.<sup>205</sup> In addition, the new rules directly conflict with such state laws.<sup>206</sup> The state statutes protect incumbent management and, as a result, conflict with the purpose of the Williams Act — investor protection.<sup>207</sup>

Although each state statute can be challenged separately, this is costly for both individual plaintiffs and society as a whole. While it may be difficult to gain support for explicit Congressional preemption of state takeover statutes,<sup>208</sup> such action would put an end to the unnecessary confusion of the investing public and obviate burdensome litigation.

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204. See *Free v. Bland*, 369 U.S. 663 (1962) (Treasury regulations preempt state law).

205. See notes 127-38 *supra* and accompanying text.

206. See notes 141-57 *supra* and accompanying text.

207. See notes 24-25 *supra* and accompanying text.

208. In 1976, the Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee of the American Bar Association's Section of Corporation, Banking and Business Law released a report in which it set forth the reasons why a majority of the Subcommittee favored legislative preemption of state takeover laws. (One of these reasons was the need for uniformity of law in the tender offer area). However, the report noted that at the time the mood of Congress made federal preemption unlikely. See Subcommittee on Proxy Solicitations and Tender Offers of the Federal Regulation of Securities Committee, *State Takeover Statutes and the Williams Act*, 32 BUS. LAW. 187 (1976). Furthermore, former SEC Commissioner Sommer stated that, practically speaking, the possibility of legislative preemption is remote. 32 BUS. LAW. 1483, 1486 (1977). Legislative preemption has been suggested by several commentators in the area of Blue Sky Laws. See Armstrong, *The Blue Sky Laws*, 44 VA. L. REV. 713 (1958); Millonzi, *Concurrent Regulation of Interstate Securities Issues: The Need for Congressional Reappraisal*, 49 VA. L. REV. 1483 (1963).